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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DUSTIN SEAN ROSS MCDONALD, Defendant and Appellant.	G054148 (Super. Ct. No. 14CF2681) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Dorsey Conley, Judge. Affirmed and remanded with directions. Respondent's request for judicial notice granted.

Elizabeth Garfinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry J. Carlton and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Dustin Sean Ross McDonald of one count of premeditated murder and two counts of attempted premeditated murder. The jury also found true three firearm sentencing enhancements. McDonald was 23 years old when he committed the crimes. The trial court imposed a prison sentence of 114 years to life.

On appeal, McDonald asserts three instructional errors (mental impairment, involuntary manslaughter, and provocation). McDonald also asserts prosecutorial misconduct, abuse of the trial court's sentencing discretion, ineffective assistance of counsel, cumulative error, and the imposition of an improper fine. We agree there is one instructional error, but we find it to be harmless beyond a reasonable doubt.

McDonald further asks for a remand based on three recent statutory changes. We grant that request, in part.

On remand, the trial court is directed to: 1) exercise its (now existing) sentencing discretion to either dismiss or not dismiss the firearm enhancements; and 2) allow the parties to create a record for any future youth offender parole hearings, which are now available to offenders who were less than 25 years of age when they committed their crimes. (Pen. Code, §§ 12022.53, subd. (h), 3051, subd. (b)(3).)[1]

We deny McDonald's request for the trial court to consider granting mental health diversion under section 1001.36 on remand. Effective January 1, 2019, the Legislature amended section 1001.36 to exclude from consideration those defendants charged with murder. (See § 1001.36, subd. (b)(2)(A).)[2]

In all other respects, the judgment is affirmed.

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[1] All further undesignated statutory references are to the Penal Code.

[2] We grant respondent's request to take judicial notice of the Assembly Floor Analysis of Assembly Bill No. 1810, and the recently amended section 1001.36. (Evid. Code, §§ 452, 459; Cal. Rules of Court, rule 8.252.)

I

FACTS AND PROCEDURAL BACKGROUND

McDonald arranged to buy drugs from Aaron Chavez at a designated intersection. When Chavez arrived at the Santa Ana location in a car, McDonald approached on foot and fired 10 shots into the car with a handgun. McDonald killed Chavez and grievously injured two other people.

Before the Shooting

A few months before the shooting, McDonald contacted Chavez and asked him about buying drugs. Ashlee C. was present, but she is not sure if a drug sale actually occurred. Ashlee and Chavez had been dating for about two years; they were sellers and users of methamphetamine and heroin. The couple often "ripped off" their customers by diluting the drugs with substances like salt (for methamphetamine) or brown sugar (for heroin), or they would simply sell the substances as drugs. Chavez did not have his own cell phone; Chavez shared Ashlee's phone.

About a month before the shooting, McDonald texted Ashlee's phone, seeking to purchase methamphetamine. Ashlee drove to a Santa Ana parking lot to meet up with McDonald; Chavez was not with her that day. McDonald got into the passenger seat of the car and Ashlee sold him what was purported to be methamphetamine. But McDonald later complained that the drug "was bad stuff." McDonald talked to Chavez, who "apologized and said that he would make it right." But as far as Ashlee was aware, Chavez never "made it right" with McDonald.

The Shooting

A little after 11:00 p.m., on August 12, 2014, Ashlee and Chavez drove to a Santa Ana restaurant, where they picked up Ashlee's former coworker, Ingrid G. Ashlee was driving, Chavez was in the front passenger seat, and Ingrid was in the backseat.

Chavez was using Ashlee's phone, arranging to sell heroin (actually, mostly brown sugar) to McDonald.

Ashlee drove to a nearby intersection, chosen by McDonald, where she parked on a street in front of a house. Ashlee selected that spot because it was better lit. The three smoked methamphetamine in the car while they waited for McDonald (although a surveillance video later revealed that about 18 minutes earlier, McDonald had actually parked his vehicle nearby). McDonald texted Chavez and told him that they were parked too far away, so Ashlee moved the car and parked across the street from where McDonald was parked, although she never shifted the transmission into "park." According to Ashlee, it was "really dark" outside.

As McDonald walked to the drivers' side of the car, Ashlee pointed him towards the passenger side where Chavez was seated with the bag of purported heroin. Chavez rolled down his window as McDonald approached the passenger side. But before any words were spoken, and as McDonald stood about three or four feet away from the car, he pulled a gun out of his waistband, pointed it at Chavez and shot him in the face. McDonald then shot Ashlee in the face; she curled up in her seat and her foot came off the brake pedal. Ashlee heard about 10 shots in quick succession. Ashlee had been shot in both legs, both arms, her hand, chest, and face.

Ingrid had been looking down at her phone in the backseat when she heard shots being fired and heard Ashlee screaming, "'he's dead.'" Ingrid felt a burning pain in her shoulder. Ingrid told Ashlee to "Go. Go. Go[,]" as the car started moving slowly forward. Ingrid threw a syringe out of the car before calling 911. Ingrid had been shot through her armpit, on her side, and in her lower back.

The Forensic Investigation

Police found Chavez dead in the front passenger seat, sitting upright with both hands folded in his lap. Chavez was holding a plastic baggie containing a substance

with trace amounts of heroin. The windows on the right side of the car had been shot out. Police found 10 expended nine-millimeter bullet casings about 70 to 80 feet away from the car; some of the casings were on the sidewalk and some were in the gutter. No weapons were found in the car.

The following day, police arrested McDonald in Garden Grove. Police searched a recreational vehicle (the RV) that McDonald lived in, as well as the surrounding area; the RV was parked at his grandmother's house. Under the lid of a barbeque grill, police found a nine-millimeter semiautomatic handgun. In the RV, police found a loaded .45-caliber semiautomatic handgun and two boxes of ammunition. Nine of the expended cartridges and all of the bullets recovered at the crime scene had striation marks consistent with being fired from the nine-millimeter handgun.

McDonald's Interview

Two Santa Ana police detectives interviewed McDonald at the station.[3] Police asked him if he had any medical problems and if he had been "diagnosed with anything?" McDonald said that he had "a form of schizophrenia and thought broadcasting." He said that he took medication, but if he does not, "I'll start getting angry at the abnormal thoughts in my head. I'll start acting funny, all kinds of things." One of the detectives said, "Okay. I've been kind of watching you here . . . while I get ready to talk to you, but I didn't see any of [those] actions. For now you're okay?" McDonald responded, "Yeah. I mean I'm not--I'm just tired."

McDonald said that he understood each of his constitutional rights and he continued to answer the detectives' questions. McDonald stated his full name and address. McDonald could not remember his cell phone number, but he did remember his grandmother's house number. McDonald answered numerous questions regarding his

[3] A video of the interview was played for the jury during the rebuttal portion of the prosecution's case. A transcript of the interview is included in the record.

biography; he told the police where he was born, where he grew up, and where his relatives live. McDonald said that he had been laid off from Boeing where he had worked as an aircraft parts assembler.

The detectives told McDonald that they were investigating an incident that happened a couple of days ago and asked him if he had any reason to be in Santa Ana. McDonald said that he used to attend a mental health program there, but the last time he had attended was two months earlier. He said, "This week I might have drove through. I don't keep track where I drive. It's just kinda drive [*sic*]. You know?" The detectives told McDonald that an assault happened a couple of days ago, his name had come up, and they wanted to hear his side of the story.

McDonald said, "It's bullsh*t what happened, dude." Detectives told McDonald "we're getting kind of conflicting stories from people that were out there." He asked, "What do you want me to say? Like I was--I was supposed to meet up with somebody, and like bullets started firing, and things like that." McDonald said, "Yeah, dude, it's--I had--I had history with somebody . . . [¶] . . . [¶] . . . and just the thoughts in my head, dude. I know now it seems like I'm probably just gonna put it on that, but I literally—I almost got poisoned once, and then through my head, it just kept running through, 'This guy's gonna kill me. This guy's gonna kill me.'"

Detectives asked McDonald if he thought the person (Chavez) was poisoning him. He responded, "Yeah, it was--it was like, I had got some drugs, and it had something weird in it." McDonald said that he only met the person a couple of times. He said that it was in his head for weeks that the person was going to kill him. McDonald realized that these were not actual messages. "It's in my head—he's in my head saying, 'I'm going to kill you,' and then he text me like, 'Hey, dude, let's meet up for some heroin.'" The detectives asked him: "But you decided to go meet with him; is that correct?" McDonald responded: "Just to get it over with."

Detectives asked McDonald what happened and he responded, "I shot a bunch of bullets." McDonald said that he was nervous when he walked up to the driver's side of the car and that he was told to walk over to the passenger side. McDonald said that he had two guns with him. He said that the handguns were in his belt covered by his shirt and that he pulled one of the guns out as he walked from the driver's side to the passenger door. McDonald said that he did not see the other person with a weapon, but he did say that "I saw the person reach-reach down." He said that the other person was about five feet away from him when McDonald fired the gun.

Court Proceedings

The prosecution charged McDonald with one count of murder and two counts of attempted murder. (§§ 187, 664.) The prosecution alleged a lying-in-wait special circumstance, and an allegation that McDonald had personally discharged a firearm causing death (Chavez). (§§ 190.2, subd. (a)(15), 12022.53, subd. (d).) The prosecution further alleged premeditation and deliberation, and that McDonald had personally discharged a firearm causing great bodily injury (Ashlee and Ingrid). (§§ 664, subd. (a), 12022.53, subd. (d).) McDonald testified at his jury trial and called three expert witnesses.

McDonald's Defense

McDonald testified that he had been experiencing delusions and auditory hallucinations since he was 16 years old. McDonald said that he knew they were hallucinations because they were different from what he was used to. He said that he took prescribed medications; the medications did not stop the hallucinations, but made them more tolerable. McDonald got into a mental health program in Santa Ana that helped him obtain the medications and helped him find work.

McDonald said that he met Chavez through someone else. McDonald testified that he had texted Chavez asking for methamphetamine, and remembered purchasing it from Chavez's girlfriend on an earlier occasion in a parking lot. He said that when he smoked the methamphetamine he discovered that it had been cut with some substance. McDonald said that he called Chavez, who told him that he would make it up to him. McDonald said that he was not really that upset about it and "kind of just forgot about it." When asked why he had told the detectives that he was almost poisoned, McDonald said that it was "maybe like an exaggeration." McDonald said that on August 12, 2014, he wanted to buy some heroin so he could get some sleep. He also wanted to talk to Chavez to get "clarification" on his "weird thoughts."

McDonald said that he chose the Santa Ana location because it was dark and there was a parking lot where he could wait. He said that when he approached the driver's side of the car and was told to go to the passenger side, he "kind of got suspicious [about] what was going on." He testified that when he got to the passenger side, Chavez "didn't say anything, didn't look at [him], just started reaching down for a gun." McDonald said that he panicked, stepped back, pulled out his gun and "shot a burst of shots." He said that he did not intend to kill and fired in self-defense. When asked why he had the guns with him, McDonald said: "Just in case, in case I had to. In case I got shot at or, you know, a gun pulled on me."

A toxicologist, a neuropsychologist, and a clinical psychologist testified on McDonald's behalf. The toxicologist testified that methamphetamine can cause paranoia, triggering fight or flight instincts and sometimes irrational thoughts or delusions. The neuropsychologist testified that when a person is in a fight or flight situation the brain focuses on survival and cannot make decisions in a normal way. The clinical psychologist diagnosed McDonald as having schizophrenia. She testified that schizophrenia is a psychotic disorder, which includes delusions and/or hallucinations. She said that McDonald told her that in the month leading up to the shooting he

repeatedly heard Chavez's voice saying that he was going to kill him; he said that the voices often happened when he would receive texts from Chavez. The psychologist testified that a person with schizophrenia may still make choices, but they are influenced by the hallucinations they are experiencing as well as their disordered thoughts.

Judgment and Sentencing

Before deliberations, the trial court instructed the jury on the charged crimes: first degree (premeditated and deliberate) murder and the two attempted murders. The court also instructed on lesser included offenses: second degree murder, voluntary manslaughter (imperfect self-defense), involuntary manslaughter, and their associated attempts. Further, the court instructed on the defenses of: justifiable homicide (self-defense), mental impairment, and hallucination.

The jury found McDonald guilty of one count of first degree murder and two counts of attempted murder. The jury found true the three firearm enhancements and the premeditation and deliberation enhancements (as to the attempted murders). The jury did not find the lying-in-wait special circumstance to be true. The court imposed a total aggregate sentence of 114 years to life (McDonald's sentencing will be covered in more detail in the discussion section of this opinion).

II

DISCUSSION

McDonald asserts three instructional errors, prosecutorial misconduct, abuse of the trial court's sentencing discretion, ineffective assistance of counsel, cumulative error, and the imposition of an improper fine. McDonald further requests a remand based on three recent legislative changes. (§§ 1001.36, 12022.53, 3051.)

A. Instructional Error Claims

We review instructional error claims de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) We determine whether the trial court fully and fairly instructed the jury on the applicable law. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) When making this determination, we consider the instructions taken as a whole; we also presume jurors are intelligent people capable of understanding and correlating all of the instructions they were given. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, overruled on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

"'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.'" (*People v. Ramos*, *supra*, 163 Cal.App.4th at p. 1088.) The ultimate question is whether there is a reasonable likelihood the jury applied the instructions that were objected to in an impermissible manner. (*People v. Hajek and Vo*, *supra*, 58 Cal.4th at p. 1220.)

McDonald challenges: 1) the mental impairment instruction as given; 2) the involuntary manslaughter instruction as given; and 3) the trial court's refusal to give the jury a provocation instruction.

1. The Mental Impairment Instruction

McDonald claims that the mental impairment instruction as given precluded the jury from considering evidence of his schizophrenia and auditory hallucinations in deciding whether he had the state of mind required for imperfect self-defense (an honest, but unreasonable belief in the need to use deadly force).
We disagree. Further, even if we were to assume error, we would find it to be harmless beyond a reasonable doubt.

a. Applicable Law

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) "Manslaughter is the unlawful killing of a human being without malice." (§ 192.) "A defendant commits voluntary manslaughter when a homicide that is committed either with intent to kill [express malice] or with conscious disregard for life [implied malice]—and therefore would normally constitute murder—is nevertheless reduced or mitigated to manslaughter." (*People v. Bryant* (2013) 56 Cal.4th 959, 968; § 189.) Two situations preclude the formation of malice and can reduce murder to voluntary manslaughter: heat of passion and imperfect self-defense. (*People v. Moye* (2009) 47 Cal.4th 537, 549.)

Imperfect (or unreasonable) self-defense applies when a homicide defendant actually believed he was facing an imminent and unlawful threat of death or great bodily injury, and actually believed his acts (that caused the victim's death) were necessary to avert the threat, but those beliefs were objectively unreasonable. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Imperfect self-defense is not a justifiable defense to a homicide (like complete or perfect self-defense); however, imperfect self-defense negates malice (*an unlawful intent* to kill) and thereby reduces a homicide which would otherwise be murder to voluntary manslaughter. (*Ibid*.)

A homicide defendant who misjudges the external circumstances may present evidence that his mental impairment contributed to his mistaken perception of the threat. (*People v. Elmore* (2014) 59 Cal.4th 121 (*Elmore*).) In *Elmore*, a mentally ill defendant stabbed a woman to death. (*Id*. at p. 130.) He claimed that delusions made him believe he needed to defend himself, and requested an instruction on imperfect self-defense. (*Id*. at p. 131.) The trial court refused; the Supreme Court agreed. (*Id*. at pp. 134-135.) The court held that evidence of insanity cannot be introduced in the guilt phase of a trial and "a belief in the need for self-defense that is *purely delusional* is a paradigmatic example of legal insanity." (*Ibid.*, italics added.) The court explained that:

"A person who sees a stick and thinks it is a snake is mistaken, but that misinterpretation is not delusional. One who sees a snake where there is nothing snakelike, however, is deluded. Unreasonable self-defense was never intended to encompass reactions to threats that exist only in the defendant's mind." (*Id*. at p. 137.)

However, the *Elmore* court also went on to reiterate that "our holding does not prevent the defense from presenting evidence of mental disease, defect, or disorder to support a claim of unreasonable self-defense based on a mistake of fact. *A defendant who misjudges the external circumstances may show that mental disturbance contributed to the mistaken perception of a threat,* without presenting the jury with the same question it would confront at a sanity trial. The jury must find there was an actual, unreasonable belief in the necessity of self-defense based on the circumstances, and it should be so instructed." (*Elmore*, *supra*, 59 Cal.4th at p. 146, italics added.)[4]

b. Procedural Background

The trial court gave the jury CALCRIM No. 571, the pattern instruction on voluntary manslaughter (imperfect self-defense):

> A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense.
>
> If you conclude the defendant acted in complete self-defense his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.

[4] We note that the Supreme Court recently held that evidence of *voluntary intoxication* cannot be similarly used to support a claim of imperfect self-defense. (*People v. Soto* (2018) 4 Cal.5th 968, 978.) However, there is nothing in *Soto* to indicate that the Supreme Court intended to reverse its holding in *Elmore*, *supra*, 59 Cal.4th 121.

> The defendant acted in imperfect self-defense if:
>
> 1. The *defendant actually believed* that he was in imminent danger of being killed or suffering great bodily injury; [¶] AND
>
> 2. The *defendant actually believed* that the immediate use of deadly force was necessary to defend against the danger; [¶] BUT
>
> 3. At least one of those beliefs was unreasonable.
>
> Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.
>
> In evaluating the defendant's beliefs, *consider all the circumstances as they were known and appeared to the defendant*.
>
> A danger is imminent if, when the fatal wound occurred, the danger actually existed or the *defendant believed it existed*. The danger must seem immediate and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future.[5] (Italics added.)

During the trial, McDonald's counsel modified the pattern jury instruction on mental impairment. (CALCRIM No. 3428.) The prosecutor asked the court to delete the last two paragraphs; he argued that they were "superfluous" and "confusing," and the concepts were covered by other instructions. The mental impairment instruction, as drafted by McDonald's counsel, read as follows:

> You have heard evidence that the defendant may have suffered from a mental disease or disorder. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, *the defendant acted with the intent or mental state required for that crime*.

[5] The trial court also instructed the jury on the lesser included offense of attempted voluntary manslaughter (imperfect self-defense) using CALCRIM No. 604, which essentially mirrors CALCRIM No. 571. For reasons of clarity, we will sometimes refer to only the lesser included offense of voluntary manslaughter; however, the same rationale applies to the two lesser included offenses of attempted voluntary manslaughter.

> The People have the burden of proving beyond a reasonable doubt that the defendant acted with the required intent or mental state, specifically: malice aforethought and willfully, deliberately, and with premeditation. If the People have not met this burden, you must find the defendant not guilty of First Degree Murder.
>
> The People have the burden of proving . . . , specifically: malice aforethought. If the People have not met this burden, you must find the defendant not guilty of Second Degree Murder.
>
> The People have the burden of proving . . . , specifically: the intent to kill. If the People have not met this burden, you must find the defendant not guilty of Attempted Murder.
>
> The People have the burden of proving . . . , specifically: willfully, deliberately, and with premeditation. If the People have not met this burden, you must find the premeditation and [*sic*] allegation of Attempted Murder not true.
>
> *The People have the burden of proving . . . , specifically implied malice aforethought. If the People have not met this burden, you . . . , must find the defendant not guilty of Voluntary Manslaughter.*
>
> *The People have the burden of proving . . . , specifically: implied malice aforethought. If the People have not met this burden, you must find the defendant not guilty of Attempted Voluntary Manslaughter.*

(CALCRIM No. 3428, italics added; the italicized last two paragraphs were later read into the record by the trial court.)

The trial court agreed with the prosecutor that the last two paragraphs were confusing.[6] After some discussion, McDonald's counsel did not object to the prosecutor's request to delete the last two paragraphs: "You know, I agree with the People with respect that there are different ways that you can get to a vol. You could

[6] The prosecution did not have the burden of proving "implied malice aforethought" as stated in the last two paragraphs (voluntary and attempted voluntary manslaughter). Again, every type of manslaughter (voluntary, involuntary, and vehicular) is by definition, "the unlawful killing of a human being *without malice*." (§ 192, italics added.)

have P and D, you could have no P and D. And either way . . . the jury could decide it's a vol. [¶] I think that express or implied covers it, but I would submit that to the court."

c. Legal Analysis

To begin with, we agree with the Attorney General that McDonald has forfeited this instructional error claim on appeal. (See *People v. Welch* (1999) 20 Cal.4th 701, 757.) McDonald did not object to the wording of the mental impairment instruction at trial, nor did he request an additional or qualifying instruction; in fact, his counsel agreed with the prosecutor's proposal to delete the last two paragraphs, which he now claims was error. Nevertheless, we will review the merits of McDonald's argument. (See *People v. Williams* (2000) 78 Cal.App.4th 1118, 1126 [court addressed forfeited issue thereby forestalling ineffective assistance of counsel claim].)

The crux of McDonald's claim is that the mental impairment instruction as given did not specifically mention the lesser included offenses of voluntary manslaughter and attempted voluntary manslaughter; therefore, he argues that the jury was "precluded" from considering whether his mental impairment affected his perceptions such that he "misinterpreted [Chavez's] movements as reaching for a gun, and thus unreasonably believed self-defense was necessary." We disagree.

In the first paragraph of the instruction, the jurors were told that they could consider evidence of McDonald's mental impairment for the "purpose of deciding whether, at the time *of the charged crime*, the defendant acted with the intent or *mental state* required *for that crime*." (CALCRIM No. 3428, italics added.) And in the remaining four paragraphs of the instruction as given, it went on to list the required intents or mental states for four of the crimes: first and second degree murder and their associated attempts. But there was no language in the instruction that confined the jury's consideration of McDonald's mental impairment to only those four crimes. (CALCRIM No. 3428.) That is, there was no language that precluded the jury from applying the

mental impairment instruction to the other lesser included crimes: voluntary or involuntary manslaughter and their attempts. Thus, the jury could consider McDonald's mental impairment as to the lesser included offenses of voluntary manslaughter and attempted voluntary manslaughter (based on imperfect self-defense).

Indeed, the final four paragraphs (beyond the first paragraph) of the mental impairment instruction as given were essentially unnecessary and/or redundant. (CALCRIM No. 3428.) The required intents or mental states for each of the four crimes was also set out and explained in each of the individual instructions for each of those crimes. (See CALCRIM No. 521 (First Degree Murder: willfully, premeditated, and deliberate); see also CALCRIM No. 520 (Murder: First and Second Degree malice aforethought); CALCRIM No. 601 (Attempted Murder: willfully, premeditated, and deliberate); CALCRIM No. 600 (Attempted Murder: intent to kill).)

Moreover, within the voluntary manslaughter instruction, the jurors were told that they could find that McDonald acted in imperfect (or unreasonable) self-defense if he "*actually believed* that he was in imminent danger of being killed or suffering great bodily injury" and he "*actually believed* that the immediate use of deadly force was necessary," but his beliefs were objectively "*unreasonable*." (CALCRIM No. 571, italics added.) The imperfect self-defense instruction also told the jurors that when "evaluating the *defendant's beliefs*, consider all the circumstances as they were known *and appeared to the defendant*." (CALCRIM No. 571, italics added.) Again, there was nothing in the mental impairment instruction that prohibited the jury from considering McDonald's schizophrenia and auditory hallucinations as it related to his beliefs (i.e., his "mental state" as specified in the first paragraph of the mental impairment instruction).

We presume the jury understood and correlated the court's instructions. (See *People v. Hajek and Vo*, *supra*, 58 Cal.4th at p. 1220.) That is, when considered together, the instructions properly told the jurors that if they found that McDonald *actually believed* Chavez had a gun and he was in imminent danger, and McDonald's

state of mind was affected by his mental impairments, but his belief was unreasonable, then they could find him guilty of the lesser included offense of voluntary manslaughter (or attempted voluntary manslaughter) under a theory of imperfect self-defense. Indeed, McDonald's counsel made precisely that argument to the jury (without objection) during her closing argument.

McDonald argues that his instructional error claim is the same as the defendant's instructional error claim in *People v. Ocegueda* (2016) 247 Cal.App.4th 1393 (*Ocegueda*). We agree that the two cases are closely aligned, but they are also conspicuously distinguishable. In *Ocegueda*, the defendant was a gang member who shot a rival gang member. (*Id.* at p. 1396.) The defendant "claimed he did so out of fear because he believed [the rival gang member] was pulling a gun on him." (*Id*. at p. 1397.) At the defendant's attempted murder trial, a psychologist testified that the defendant had and an intellectual developmental disability (formerly called retardation). (*Id*. at p. 1402.) The psychologist said that the "defendant had difficulty planning and understanding the causes and effects of his actions. He also had difficulties in problem solving and considering or weighing his options." (*Ibid*.)

In *Ocegueda*, *supra*, 247 Cal.App.4th at page 1405, the trial court instructed the jury on attempted voluntary manslaughter (imperfect self-defense). The court also instructed on mental impairment as follows: "'You have heard evidence that the defendant may have suffered from a mental disease, defect, or disorder. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crimes and special allegations, the defendant acted or failed to act with the specific intent or mental state required for those crimes and special allegations. [¶] *Those specific intents and mental states are as follows*: [¶] Number 1: The intent to kill contained in attempted murder and attempted voluntary manslaughter. [¶] Number 2: The premeditation and deliberation contained in the special allegation relating to the

charge of attempted murder.'" (*Id*. at p. 1405, italics added [the italicized phrase was not included in the mental impairment instruction in this case].)

The *Ocegueda* court reiterated that "California law allows the jury to consider a defendant's mental disabilities in deciding whether he or she had an actual but unreasonable belief in the need for self-defense." (*Ocegueda, supra,* 247 Cal.App.4th at p. 1407.) However, the court found that the jury instruction as written "*explicitly limited* the jury's consideration of mental disabilities to the issue of whether he intended to kill." (*Id*. at p. 1409, italics added.) The court held that mental impairment "instruction was therefore erroneous." (*Ibid*.) However, the court went on to find that the instructional error was not prejudicial. (*Id*. at pp. 1410-1411.)

Here, the trial court's instruction did not have the limiting language that the court found objectionable in *Ocegueda*. Again, in *Ocegueda*, the mental impairment instruction limited the jury's consideration of the defendant's mental disability to only those crimes that were listed in that instruction: "'*Those specific intents and mental states are as follows*: . . . [.]'" (*Ocegueda*, *supra*, 247 Cal.App.4th at p. 1405, italics added.) However, in this case the mental impairment instruction (along with the imperfect self-defense instruction) allowed the jury to consider whether McDonald's schizophrenia or auditory hallucinations had any effect on any of the charged crimes (murder and attempted murder), as well as the lesser included crimes (voluntary manslaughter and attempted voluntary manslaughter based on imperfect self-defense).

d. Harmless Error

In *Ocegueda*, the appellate court found that the instructional error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Ocegueda, supra*, 247 Cal.App.4th at pp. 1406-1407 [no reasonable probability of a more favorable result in the absence of the error].) McDonald argues that any prejudice must be considered under *Chapman v. California* (1967) 386 U.S. 18, 23-24 (*Chapman*) [harmless error beyond a

reasonable doubt].) But we need not decide the question; even if we were to assume error, we would find it to be harmless under the more rigorous *Chapman* standard.

Again, McDonald contends that the trial court's mental impairment instruction precluded the jury from considering evidence of his mental impairments in deciding whether he had committed the lesser included offenses of voluntary manslaughter and attempted voluntary manslaughter (based on imperfect self-defense). But the court also instructed the jury that it could not find McDonald guilty of first degree murder and first degree attempted murder unless the prosecution had proven beyond a reasonable doubt that he premeditated and deliberated or "carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." (CALCRIM Nos. 521 & 601.) And the court instructed the jury that they could not find McDonald guilty of a lesser included offense unless they found him not guilty of the greater offense. (CALCRIM No. 3517.)

Here, there was overwhelming evidence of premeditation and deliberation. McDonald told the police that he suspected Chavez had earlier poisoned him. McDonald said that he had initiated the contact with Chavez, told him when and where to meet, and then he had Ashlee park in a darker spot. McDonald said that he had arranged to meet with Chavez: "Just to get it over with." McDonald had two loaded handguns with him, and he told police that he had one of his guns drawn as he walked from the driver's side to the passenger side of the car. This statement in particular essentially undercut his later trial testimony about panicking and pulling out a gun in purported self-defense. Finally, McDonald shot Chavez in the face without warning, then shot into the car nine more times, hitting Ashlee and Ingrid multiple times.

The jury found that McDonald premeditated and deliberated as to the murder *and the two attempted murders*. We cannot see how the jury's finding (that McDonald carefully weighed the considerations and decided to kill the three people in the car) can be reconciled with imperfect self-defense, which would have required a

finding that McDonald "actually believed that he was in *imminent danger* of being killed or suffering great bodily injury" and he actually, but unreasonably "believed that the *immediate use* of deadly force was necessary[.]" (CALCRIM No. 571, italics added.)

We find beyond a reasonable doubt that the jury would have found McDonald guilty of the greater offenses (first degree murder and attempted murder), even if we assume error in the mental impairment instruction as it related to the lesser included offenses of voluntary and attempted voluntary manslaughter.

2. The Involuntary Manslaughter Instruction

McDonald claims that the involuntary manslaughter instruction as given improperly contained a diminished capacity test. We agree. The instruction contained a misstatement of the law; since 1981, diminished capacity does not exist as a valid defense in California courts. But the instructional error was undoubtedly harmless beyond a reasonable doubt.

a. Applicable Law

Involuntary manslaughter is "the commission of an unlawful act, not amounting to a felony; or . . . the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) "Involuntary manslaughter is a lesser offense of murder . . . ." (*People v. Butler* (2010) 187 Cal.App.4th 998, 1006.) "The mens rea for murder is specific intent to kill [actual malice] or conscious disregard for life [implied malice]. [Citation.] Absent these states of mind, the defendant may incur homicide culpability for involuntary manslaughter." (*Ibid.*)

Under a diminished capacity theory, a defendant may be legally sane, but nevertheless lack *the capacity* to form the intent necessary for the crime charged. Under former California law, such a defendant could be found guilty of a lesser included offense

or could be acquitted. (See *People v. Wells* (1949) 33 Cal.2d 330, 346, superseded by statute as stated in *People v. Saille* (1991) 54 Cal.3d 1103, 1109-1110.) But in 1981, the Legislature abolished the defense of *diminished capacity*, while preserving the defense of *diminished actuality*. (§ 28, subd. (a), added by Stats. 1981, ch. 404, § 4, p. 1592; *People v. Steele* (2002) 27 Cal.4th 1230, 1253.)

"Evidence of mental disease, mental defect, or mental disorder *shall not be admitted* to show or negate *the capacity* to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder *is admissible* solely on the issue of whether or not the accused *actually formed* a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (§ 28, subd. (a).) "As a matter of public policy there shall be no defense of diminished capacity . . . in a criminal action or juvenile adjudication hearing." (§ 28, subd. (b).)

The doctrine of invited error operates to prevent a party from asserting an error when his or her own conduct induces the commission of error. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.) "'The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. . . . [I]t also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake.'" (*Ibid.*)

b. Procedural Background

During discussions regarding the proposed jury instructions, McDonald requested an instruction on involuntary manslaughter. The prosecution did not object. After some discussion, it was agreed that McDonald's counsel would revise the pattern involuntary manslaughter instruction. (CALCRIM No. 580.)

The following revised involuntary manslaughter instruction was provided to the jury without objection: "When a person does not actually form the intent to kill or does not premeditate and deliberate due to a mental illness, then the defendant is not guilty of murder and voluntary manslaughter and may be guilty of involuntary manslaughter. [¶] A mental disorder is admissible solely on the issue of whether or not the accused *actually formed* a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged, see CALCRIM 252, page 13. [¶] The defendant committed involuntary manslaughter if: [¶] 1. There is reasonable doubt as to whether the defendant *could actually form the necessary intent* to unlawfully kill with malice aforethought due to mental illness; AND [¶] 2. The defendant's acts unlawfully caused the death of another person." (CALCRIM No. 580, italics added.)

c. Legal Analysis

Here, the involuntary manslaughter instruction contained both a correct and an incorrect statement of the law. The instruction correctly told the jury that McDonald's "mental disorder is admissible solely on the issue of whether or not the accused *actually formed* a required specific intent . . . ." (Italics added.) However, the jury was also incorrectly told that it could find McDonald guilty of involuntary manslaughter if there was a "reasonable doubt as to whether the defendant *could actually form* the necessary intent to unlawfully kill with malice aforethought due to mental illness . . . ." (Italics added.) We agree with McDonald's argument (raised for the first time in this appeal) that the instruction effectively told the jurors that they were able to consider defendant's *diminished capacity* to commit a crime due to his alleged mental disorders. This was plainly error.

The Attorney General argues that McDonald's trial counsel invited the error and he should be estopped from raising it on appeal. We essentially agree that the

error was invited, but we are not sure that it was done for tactical reasons. It appears to have been a mistake. Thus, the invited error doctrine would not apply. (See *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 49.)

Nevertheless, the error was unquestionably harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at pp. 23-24.) The instruction provided McDonald with a possible defense at his trial—diminished capacity—that was simply not available to him under California law. Therefore, the error could have only benefitted him. We cannot discern a credible argument that McDonald was somehow harmed by the error.

3. The Provocation Instruction

McDonald claims that the trial court committed error by refusing his request for a provocation instruction. We disagree and find no error. And again, even if we were to assume error, we would not find it to be prejudicial.

a. Relevant Law

There are two types of provocation in the context of homicides: subjective and objective. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1334.) Subjective provocation may reduce a murder from first degree to second degree where the provocation "would not cause an average person to experience deadly passion but it preclude[d] the defendant from subjectively deliberating or premeditating." (*Id.* at p. 1332.) Objective provocation may reduce a second degree murder to voluntary manslaughter if the provocation is such that it would cause an ordinary person to react

under a heat of passion. (*Ibid*.) The archetypal example of objective provocation is when a person catches his or her spouse in bed with another person.[7]

The word "provocation" has no technical meaning peculiar to the law. (*People v. Hernandez*, *supra*, 183 Cal.App.4th at pp. 1332-1333.) Provocation means "something that provokes, arouses, or stimulates"; provoke means "to arouse to a feeling or action [;] . . . to incite to anger." (Webster's Collegiate Dict. (11th ed. 2007) p. 1002; see *People v. Ward* (2005) 36 Cal.4th 186, 215 ["provocation . . . is the defendant's emotional reaction to the conduct of another, which emotion may negate a requisite mental state"].) "[P]rovocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation." (*People v. Hernandez*, *supra*, 183 Cal.App.4th at p. 1334.)

b. Procedural Background

The pattern instruction on the defense of provocation reads as follows: "Provocation may reduce a murder from first degree to second degree. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder." (CALCRIM No. 522.)

During discussions regarding the jury instructions, McDonald requested the provocation instruction, CALCRIM No. 522. The court said, "I'm not sure I see any provocation." McDonald's counsel responded: "The provocation, I believe at least the evidence was that there was a movement down. That could be provocation." The prosecution argued that this was covered by the self-defense instruction. McDonald's

[7] Again, there are two ways a murder can be reduced to voluntary manslaughter: heat of passion and imperfect (or unreasonable) self-defense. (*People v. Moye*, *supra*, 47 Cal.4th at p. 549.) McDonald concedes that he was not entitled to an instruction on voluntary manslaughter based on heat of passion. That is, he admits that any of his actions based on any perceived "provocation" by Chavez were not *objectively* reasonable.

counsel responded, "I respectfully disagree. I believe the jury should be given this as a theory, because there is some indication, whatever weight the jury gives to it, the jury can give to it. But if there is a reach down, especially in light of the fact that this is an illegal drug sale, that could cause [McDonald] to have acted rashly and under the influence of that intense panic. And I would request the instruction."

The court initially said that it was going to give the provocation instruction out of "an abundance of caution. There's some evidence." But after some discussion, the court said, "I'm revising my ruling. I think I will take out . . . CALCRIM [No.] 522, provocation. And I'm refusing the request for voluntary manslaughter, heat of passion. We'll take that one out."

c. Legal Analysis

Here, when McDonald initially spoke to the police after his arrest he did not say that he saw Chavez with a weapon, but he did say that, "I saw him reach-reach down . . . ." At trial, McDonald testified that when he approached the passenger side of the car, Chavez "didn't say anything, didn't look at [him], just started reaching down for a gun." McDonald said that he "panicked," stepped back, and "shot a burst of shots." McDonald said that he did not intend to kill and fired in self-defense.

Based on this testimony, we find no evidence of "provocation" in the way that term is ordinarily used or would have been understood by the jury. There was no evidence that McDonald had an "emotional reaction" to Chavez's conduct, which arguably caused him to make a "rash" or "impulsive decision" to shoot. Rather, McDonald's claim that he acted in self-defense when he thought Chavez was reaching for a gun was adequately covered by the self-defense and imperfect self-defense instructions. The court instructed the jury that it could not find McDonald guilty of any of the charged or lesser include crimes if he acted in lawful self-defense. (CALCRIM No. 505.) And again, the court also instructed the jurors that they had to find imperfect self-defense if

they found that McDonald actually believed that his life was in imminent danger, but his belief was objectively unreasonable. (CALCRIM Nos. 571, 604.)

In sum, we find no error in the court's refusal to instruct on provocation. McDonald also argues that: "It was error to refuse the requested provocation instruction for second-degree murder, while providing an incomplete pattern instruction on hallucinations." (Original capitalization and boldfacing omitted.) We disagree.

A person's hallucination is a perception that is not based on any objective reality. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 677.) "[E]vidence of a hallucination . . . is inadmissible to negate malice so as to mitigate murder to voluntary manslaughter but is admissible to negate deliberation and premeditation so as to reduce first degree murder to second degree murder." (*Ibid.*) The court has a sua sponte duty to give defense instructions supported by substantial evidence and not inconsistent with defendant's theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 195.) However, "'[a] party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial.'" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1165.)

Here, the court instructed the jury without objection using the pattern hallucination instruction, CALCRIM No. 627. The instruction reads as follows: "A hallucination is a perception not based on objective reality. In other words, a person has a hallucination when that person believes that he is hearing something that is not actually present or happening. [¶] You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met this burden, you must find the defendant not guilty of first degree murder." (CALCRIM No. 627.)

McDonald's claim that the pattern hallucination instruction is incomplete is forfeited on appeal because he did not request a clarification or a modification of the

instruction during the trial. Moreover, McDonald has not told us precisely how the trial court could or should have modified the allegedly incomplete instruction. Indeed, the pattern hallucination instruction is an accurate and complete statement of the law. (See *People v. Padilla*, *supra*, 103 Cal.App.4th at p. 679.)

McDonald also argues that: "The pattern hallucination instruction the jury received is premised on a provocation defense. It must be given in tandem with the provocation instruction to support that defense, and, if given alone, it is misleading for other available mental-illness defenses." (Original capitalization and boldfacing omitted.) McDonald did not argue at trial that the hallucination instruction was "premised" on any other defenses, including a provocation defense. This argument is therefore forfeited. Finally, McDonald cites no authority for the proposition that the hallucination instruction must be given "in tandem" with any other instruction, including the provocation instruction.

d. Harmless Error

Again, even if we were to assume error, we would find the error to be harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at pp. 23-24.) Largely for the reasons we have already discussed, we do not think that the jurors would have found that Chavez somehow provoked McDonald's response had they been so instructed. The jury necessarily rejected the defenses of either perfect or imperfect self-defense. And again, there was overwhelming evidence supporting the jury's finding that McDonald premeditated and deliberated before committing the murder and the two attempted murders. (See *ante*, pp. 18-20.)

B. Prosecutorial Misconduct Claims

McDonald claims that the prosecutor committed misconduct by making an improper argument to the trial court and by misstating the law to the jury. We disagree.

We evaluate claims of prosecutorial misconduct under well-established standards. "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Generally, in order to raise any alleged errors on appeal, they must have first been brought to the attention of the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) Specifically, a defendant forfeits any complaint of prosecutorial misconduct on appeal unless he or she objected to the alleged misconduct at the time it occurred and also requested that the jury be admonished to reject the alleged impropriety. (See *People v. Ervine* (2009) 47 Cal.4th 745, 806.)

McDonald first argues that the prosecutor committed misconduct because he "successfully requested that voluntary manslaughter be removed from the mental-illness instruction." This was plainly not prosecutorial misconduct. There is no indication that the prosecutor used "deceptive or reprehensible" tactics. The prosecutor correctly argued that the mental impairment instruction was confusing and that the concepts were covered by other instructions. Further, as we held earlier, the alleged instructional error was not prejudicial; therefore, the alleged prosecutorial misconduct could not have rendered the trial fundamentally unfair.

McDonald also claims that the prosecutor committed misconduct during closing argument by raising the diminished capacity test, which had been erroneously included in the involuntary manslaughter instruction. The prosecutor arguably made several allusions to this erroneous defense, including asking the jury whether McDonald was "*capable of forming the intent* for the crime? That's really what it boils down to." (Italics added.) But McDonald did not object to the alleged misconduct; neither did he ask the court to admonish the jury. Therefore, this claim has been forfeited. In any

event, any mention of the diminished capacity defense could only have worked to McDonald's advantage. Thus, there was no prejudice.

C. Consecutive Sentencing Error Claim

McDonald claims that the trial court abused its discretion by imposing consecutive (rather than concurrent) sentences. We disagree.

When a defendant is "convicted of two or more crimes" the trial court may impose "the terms of imprisonment" either "concurrently or consecutively." (§ 669, subd. (a).) The court must state on the record its reasons for imposing consecutive sentences and is generally guided by factors stated within the state court rules. (See Cal. Rules of Court, rules 4.406, 4.425; *People v. Scott* (1994) 9 Cal.4th 331, 349-350.) However, there is no presumption of concurrent sentencing. (*People v. Black* (2007) 41 Cal.4th 799, 822 [a "court may consider aggravating and mitigating factors, but there is no requirement that, in order to justify the imposition of consecutive terms, the court find that an aggravating circumstance exists"].)

"It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively. [Citations.] In the absence of a clear showing of abuse, the trial court's discretion in this respect is not to be disturbed on appeal. [Citation.] Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) Generally, a reviewing court may not reverse a trial court's exercise of its discretion unless the court acted in an """"arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."""" (*People v. Clark* (2016) 63 Cal.4th 522, 572.)

Here, after considering McDonald's probation report, victim impact evidence, and arguments from both counsel, the trial court stated that "here is a defendant with no prior record to speak of, who is relatively young, but who did some devastating

shooting on the date in question. . . . How do you say . . . that this is just 50 to life, which is a huge sentence, and kind of forget what happened to Ashlee and Ingrid? I don't think that would be proper. I don't think that would be fair. I don't think that would be just. [¶] . . . [¶] The court is going to impose the maximum sentence. I was asked to extend mercy, but I don't see mercy in a case like this . . . . The crime is so, so bad compared to the defendant's mental situation, his age, and his lack of prior record, that I think the full extent of the law should be imposed."

The trial court stated some of the aggravating and mitigating sentencing factors when it detailed its reasons for imposing consecutive sentences (e.g., multiple victims, as well as McDonald's age and lack of criminal record). There is no indication that the court approached its decision in an arbitrary or capricious manner. Its ruling was not beyond the bounds of reason. Thus, the court did not abuse its discretion.

McDonald argues that the trial court "abused its discretion by failing to address all mitigating factors which provided for concurrent sentencing." But we presume that the court considered the appropriate factors. (See *People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 831 [a court is presumed to have considered all the relevant sentencing criteria].)

D. Ineffective Assistance of Counsel Claims

McDonald claims that he was denied effective assistance of counsel in violation of his constitutional rights. We disagree.

A criminal defendant has a right to effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 685-686 (*Strickland*).) To establish a violation of this right, a defendant must show: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and 2) this resulted in prejudice to the defendant. (*Id.* at pp. 687-688, 691-692.) There is "a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Id*. at p. 689.)

"'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . , that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697.)

Here, McDonald claims his trial counsel was ineffective: 1) by drafting the involuntary manslaughter instruction (which contained the erroneous diminished capacity test); 2) by failing to object during the prosecutor's closing argument (to the allusions to the erroneous diminished capacity test); and 3) by failing to file a sentencing brief, which may have more persuasively argued the factors in mitigation.

As recommended by the Supreme Court, we shall dispose of these claims based on a lack of prejudice. (See *Strickland*, *supra*, 466 U.S. at p. 670.) Again, as far diminished capacity, that defense should not have been raised at all. Therefore, any mentions of the erroneous defense, either by defense counsel or the prosecutor could have only worked to McDonald's advantage. Further, as we have already discussed, we presume that the trial court considered all of the relevant sentencing factors, including those in mitigation. Given the trial court's stated analysis, we are highly confident that it would not have imposed a more lenient sentence had McDonald's counsel filed a sentencing brief.

E. Cumulative Error Claim

McDonald argues that the cumulative effect of his prior instructional, prosecutorial misconduct, and ineffective assistance of counsel claims, requires reversal of his convictions. We disagree.

"In theory, the aggregate prejudice from several different errors occurring at trial could require reversal even if no single error was prejudicial by itself." (*In re Reno* (2012) 55 Cal.4th 428, 483.) However, the rejection of specific individual claims "cannot logically be used to support a cumulative error claim." (*Ibid*.)

Here, McDonald argues that his three claims of instructional error taken together "rendered the proceedings fundamentally unfair" and violated his rights to due process. But the only instructional error we have identified actually worked to McDonald's advantage and provided him with a defense to which he was not legally entitled (diminished capacity). As to the other claims, we found no errors. Thus, we find no cumulative or aggregated prejudice.

F. Parole Revocation Fine Claim

McDonald claims that "the parole-revocation fine must be dismissed, because [he] has no reasonable possibility of being paroled." (Original capitalization and boldfacing omitted). He is mistaken.

Trial courts are required to impose a parole revocation fine "[i]n every case where a person is convicted of a crime and his or her sentence includes a period of parole." (§ 1202.45, subd. (a).) The fine is stayed until such time as the person is granted parole and it is levied only if the parole is actually revoked. (§ 1202.45, subd. (c).) The fine is improper if a person is sentenced solely to death or life in prison without the possibility of parole. (See *People v. Battle* (2011) 198 Cal.App.4th 50, 63.)

Here, the trial court sentenced McDonald to a term of life in prison—with the possibility of parole—on the murder charge (25 years to life), the two attempted

murder charges (14 years to life) as well as the three firearm enhancements (75 years to life). The total aggregate sentence is 114 years to life (as of now).[8] Nevertheless, the sentence does include *the possibility* of parole. Accordingly, the court properly imposed and stayed the parole revocation fine.

McDonald cites *People v. Brasure* (2008) 42 Cal.4th 1037 (*Brasure*), for the proposition that since no portion of his sentence includes a determinate term, a parole revocation fine cannot be imposed. We disagree. In *Brasure*, the trial court imposed a parole revocation fine on a defendant with a death sentence and a determinate term. (*Id*. at p. 1075.) The Supreme Court cited section 3000, subdivision (a)(1), which provides: "A sentence resulting in imprisonment in the state prison pursuant to *Section 1168 or 1170* shall include a period of parole supervision . . . ." (Italics added.) Since the defendant's sentence also included a determinate term under section 1170, the court held that the parole revocation fine was properly imposed. (*Brasure*, *supra*, at p. 1075.)

Here, the trial court imposed McDonald's sentence, in part, under the statutory authority of California's indeterminate sentencing laws, including section 1168. (See *People v. Lyons* (1999) 72 Cal.App.4th 1224, 1227-1228.) As stated in *Brasure*, "a period of parole" also expressly applies to sentences imposed under section 1168. (*Brasure*, *supra*, 42 Cal.4th at p. 1075.) Accordingly, McDonald's sentence "shall include a period of parole" and is subject to a stayed parole revocation fine. (See 1202.45, subd. (a); see also *Brasure*, *supra*, 42 Cal.4th at p. 1075.)

G. Remand Request (*Mental Health Diversion*)

McDonald argues that section 1001.36, which allows for the pretrial diversion of defendants with mental disorders, applies retroactively to cases not yet final on appeal. We agree. (See *People v. Frahs* (2018) 27 Cal.App.5th 784.) However,

[8] The firearm enhancements may or may not be dismissed on remand, as will be discussed later in this opinion.

effective January 1, 2019, the Legislature amended section 1001.36, to exclude those defendants charged with murder. (See § 1001.36, subd. (b)(2)(A).) The prosecution charged McDonald with one count of murder (and two counts of attempted murder). Therefore, we deny McDonald's request for the trial court to consider granting mental health diversion under section 1001.36 on remand.

In supplemental briefing, McDonald argues that the failure to give him the opportunity for mental health diversion on remand violates the ex post facto clauses of the California and United States Constitutions. We disagree.

"A statute violates the prohibition against ex post facto laws if it punishes as a crime an act that was innocent when done or increases the punishment for a crime after it is committed." (*People v. White* (2017) 2 Cal.5th 349, 360.) The ex post facto prohibition ensures that people are given "fair warning" of the possible punishment they may be subjected to if they violate the law; they can rely on the meaning of the statute until it is explicitly changed. (*Weaver v. Graham* (1981) 450 U.S. 24, 32, fn. 17.)

On August 12, 2014, McDonald committed the crime of murder (and the two attempted murders). On that date, the possibility of pre-trial mental health diversion did not exist (the earlier version of section 1001.36 became effective on June 27, 2018). Consequently, McDonald could not have relied on the possibility of pre-trial mental health diversion when he committed the crime of murder. Moreover, the Legislature's amendment of the statute to eliminate murder as eligible offense (effective January 1, 2019), did not make an act unlawful that was not formerly unlawful, nor did it increase the punishment for any crime. (See *People v. White*, *supra*, 2 Cal.5th at p. 360.) Thus, the amendment does not violate ex post facto considerations.

H. Remand Request (*Firearm Allegations*)

McDonald asks us to remand this matter to the trial court so it can consider whether to dismiss the firearm sentencing enhancements. We will make that order.

The version of section 12022.53 in effect at the time of McDonald's sentencing did not permit the trial court to exercise its discretion to strike or dismiss the firearm enhancements. But since then, the statute has been amended. Section 12202.53, subdivision (h), now reads: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Here, the trial court imposed three firearm enhancements under section 12022.53. The Attorney General concedes that the amended statute applies to McDonald because it has the potential to lessen the punishment and McDonald's case is not yet final on appeal. (See *People v. Francis* (1969) 71 Cal.2d 66, 69-70; *In re Estrada* (1965) 63 Cal.2d 740.) We agree. The court will have an opportunity to exercise its discretion on remand (of course, we take no position on the merits of any possible dismissal orders).

I. Remand Request (*Youthful Offender Parole Hearings*)

Finally, McDonald asks for an opportunity to prepare a record for any future youth offender parole hearings. We will make that order.

Effective January 1, 2018, the Legislature amended section 3051 to provide youth offender parole hearings to certain felons who were 25 years of age or younger when they committed their crimes. McDonald was 23 years old when he committed the three crimes. Therefore, the amendment to section 3051 renders McDonald eligible for a youth offender parole hearing on his "25th year of incarceration." (§ 3051, subd. (b)(3).) Felons eligible for youth offender parole hearings are entitled to a sufficient opportunity—preferably at or near the time of the offense—to assemble a record of information for their eventual hearings. (See *People v. Franklin* (2016) 63 Cal.4th 261, 283-284 (*Franklin*).) Because McDonald never had that opportunity, he is entitled to have one now.

The Attorney General essentially argues that the sentencing record as it stands is sufficient. That may be true. Nevertheless, we direct the trial court to conduct a "*Franklin* hearing," which may be held concurrently with the sentencing hearing regarding the firearm enhancements. Both parties are to be given the opportunity to put on the record *any additional relevant* evidence that demonstrates McDonald's "culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

III

DISPOSITION

The matter is remanded with directions to the trial court to conduct a sentencing hearing and a "*Franklin* hearing" as discussed within this opinion. In all other respects, the judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

THOMPSON, J.

GOETHALS, J.